Supreme Court, U. S.
FILED
JUN 23 1976
MICHAEL RODAK, JR., CLERK

No. 75-1849

In the
Supreme Court of the United States
OCTOBER TERM, 1976

HUBERT SPAIN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN J. WALLACE
ELLIOTT KALCHEIM
79 West Monroe Street,
Chicago, Illinois 60603
Attorneys for Petitioner

WALLACE, SHELTON, KLEINMAN & KALCHEIM
79 West Monroe Street,
Chicago, Illinois 60603
782-9035
Of Counsel

The Scheffer Press, Inc.—(312) 263-6850

INDEX

PAGE

Prayer 1

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions Involved 2

Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Granting the Writ 7

1. The evidence established entrapment as a matter of law 7

2. The government abused the rights and privileges of the defendant when the prosecutor used language in his final argument that was so blatantly prejudicial as to deny the defendant a fair trial and due process of law 10

Conclusion 16

Appendix

A. Opinion of the Court of Appeals A1

List Of Authorities Cited

Cases:

Glasser v. United States, 315 U.S. 60 15

Hampton v. United States, 96 S.Ct. 1646 10

People of the State of Illinois v. Weathers, 62 Ill.2d 114 12

Sorrells v. United States, 287 U.S. 435 7

United States v. Bastone, 526 F.2d 971 12

United States v. Berger, 73 F.2d 278 15

United States v. Phillips, U.S. Court of Appeals 7th Cir. No. 75-1423 (December 12, 1975) 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

HUBERT SPAIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PRAYER

The petitioner, Hubert Spain, respectfully prays that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Seventh Circuit in this proceeding entered on May 25, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, not yet reported, affirming the judgment of conviction below, is attached hereto and appears in Appendix "A".

STATEMENT OF JURISDICTION

The petitioner, Hubert Spain, appealed his conviction in the United States District Court for the Northern District of Illinois to the United States Court of Appeals for the Seventh Circuit. On May 25, 1976, the United States Court of Appeals for the Seventh Circuit affirmed the judgment of conviction. This court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to establish entrapment as a matter of law.

2. Whether the closing argument by the government prejudiced the petitioner and denied him a fair trial and due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fifth Amendment to the Constitution of the United States provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment to the Constitution of the United States provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTORY PROVISIONS INVOLVED

Title 21, Section 841, U.S.C. states:

Drug abuse - Prevention, Control. Prohibited Acts A-Unlawful acts.

(a) Except as authorized by this sub-chapter it shall be unlawful for any person knowingly or intentionally.

1. To manufacture, distribute or dispense or possess with intent to manufacture, distribute or dispense a controlled substance.

(b) Except as otherwise provided in Section 845 of this title any person who violates sub-section (a) of this section shall be sentenced as follows:

1. (A) In the case of a controlled substance in Schedule I or II which is a narcotic drug such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both.

   (B) In the case of a controlled substance in Schedule I or II which is not a narcotic drug or in the case of any controlled substance in Schedule

III such person shall be sentenced to a term of imprisonment of not more than five years, a fine of not more than $15,000, or both.

STATEMENT OF THE CASE

The Petitioner, Hubert Spain, was found guilty of distributing controlled substances.

Trial was by a jury. Upon a verdict of guilty on the aforementioned counts, judgments of convictions were entered and he was sentenced to the custody of the Attorney General for a period of three years on each of the said counts with sentences to run concurrently on each count and a special parole of two years consecutively to make it a total of six years.

It is from these judgments and sentences that the petitioner appealed.

The defense and prosecution offered sharply differing versions of the facts. Drug Enforcement Administration agents learned that defendant, who operated a pharmacy on Chicago's south side, had ordered large amounts of quinine, which is not a controlled substance but which is sometimes used to dilute heroin. DEA Agent Kenneth L. Rhodes called defendant by telephone and, without identifying himself, said he wanted to talk to defendant about "some Q", meaning quinine. Defendant told him to come to the pharmacy. Rhodes did so the next day and offered to trade quinine for "uppers. . . . That is some fat pills." Defendant said he could get as much didrex, a controlled substance, as Rhodes wanted. Defendant examined bottles of quinine Rhodes had brought with him and asked whether Rhodes had any sealed bottles. Rhodes replied that he did.

The next day Rhodes again called defendant and agreed on the specific terms of a barter of quinine for didrex tablets. That afternoon the transaction was consummated, future barters were discussed, and it was arranged that a messenger, who turned out to be Agent Kenneth Labik, would handle future transactions on behalf of Rhodes.

Subsequent transactions during the next month followed the same pattern, except that in some instances controlled substances other than didrex were received for the quinine. The last of these transactions was initiated by defendant, who telephoned Agent Labik and said he "had 500 tablets of didrex for sale for 50 ounces of quinine" and agreed to meet Labik in a parking lot to make the exchange. At that meeting defendant delivered the didrex to Labik and was immediately thereafter arrested. After being duly informed of his constitutional rights, defendant at first said he was using the quinine to prepare a hair product, but then admitted that he was selling it to narcotics dealers. There was no evidence of other prior criminal activity by defendant. Evidence indicated the government formulated and created the activity to contact the defendant.

Defendant's version of the facts was markely different from that of the agents. He testified that, in their first meeting, Rhodes identified himself and "said that he wanted to catch this white fellow and his friends that are selling, pushing pills to the black kids in the community and he needed my cooperation." Defendant testified that he at first declined but after being threatened with harassment agreed to cooperate, following which Rhodes gave him pills with instructions to give them to the suspected pusher in return for quinine. Defendant's account of the conversation was corroborated by a witness

who testified that he overheard it while repairing a stamp machine nearby. Agent Labik was this "white fellow".

Later, defendant testified, a stranger delivered to him at the pharmacy a package containing a controlled substance which he later delivered to Labik in exchange for quinine. This was corroborated by a witness who testified that he was sitting in an automobile smoking a marijuana cigarette when three men approached him and told him they were police and would arrest him unless he delivered a package to the pharmacy of defendant, whom he did not know, and that he then delivered the package.

Defendant's account of the arrest also differed sharply from the accounts of the agents. He testified that a dirty cigar picked up from the ground was shoved into his mouth by one of the agents, that the agents threatened to kill him, and that one held a gun to his head. He denied making any admission to the agents that he was selling quinine to narcotics dealers. These assertions were first made at the trial. The agents testified that they did not assault or threaten defendant. Defendant testified Labik called and left his telephone number and that is how and why he called that man (Labik) concerning the last transaction, which therefore was initiated by the Government.

There were other disputed issues of fact, such as whether quinine is difficult to obtain in large quantities and whether defendant had a legitimate use for quinine in connection with experiments he was conducting to develop a hair grooming product.

REASONS FOR GRANTING THE WRIT

1. THE EVIDENCE ESTABLISHED ENTRAPMENT AS A MATTER OF LAW.

The defense of entrapment is notably set forth in the established case of *Sorrells* v. *United States,* 287 U.S. 435 at 441, 442, wherein it is stated as follows:

> "It is well settled that the fact that officers or employees of the government merely afford opportunity facilities for the commission of the offense does not defeat the prosecution."
> "A different question is presented when the criminal design originates with the official of the government and they in plant in the mind of an innocent person the disposition to commit the alleged offense."

The criteria of entrapment which has won general acceptance is the "subjective" or "origin of intent" test which allows the defense only if the criminal act was the product of the created activity of law enforcement officials. The court supplying this test make two inquiries. Whether there was inducement on the part of the government official and if so, whether the defendant showed any pre-disposition to commit the offense. Generally, therefore, where the criminal intent originates in the mind of the entraping person and the accused is lured into the commission of the offense charged in order to prosecute him, no conviction may be held.

The Court of Appeals stated the defense and prosecution offered sharply differing versions of the facts (Appendix "A", page A2). Therefore, for all practical purposes the court erased any thoughts that entrapment did exist, but on the other hand disclosed a distinct feeling that the possibility of entrapment was evident.

The Court of Appeals then properly disclosed in its opinion that there was no evidence of other prior criminal activity by the defendant (Appendix "A", page A3) by the fact that throughout the entire transcript of testimony in this matter there is not one single instance of the defendant's engagement in prior criminal activity of any nature whatsoever.

In the opinion quoted herein at (Appendix "A", page A5) it is stated that inconsistencies in the government case do not require inference that the government agents perjured themselves. (No abstract for Appendix was prepared on appeal to the Seventh Court of Appeals and TR refers to pages in the trial transcript.) A look at the transcript (Tr. 36) shows that the reputation of the defendant and his integrity was neither refuted or attacked in any fashion by the government while on the other hand there was clear impeachment of Agent Labik on cross-examination, when he testified that any citizen can go into almost any drug store and purchase a small amount of quinine if they have it available; and when Agent Labik testified before the Grand Jury while also under oath and when he was asked the question "is quinine hard to get hold of?", his answer was "quinine is very difficult to get hold of, yes, sir." (Tr. 135). That after this clear impeachment in his testimony at (Tr. 135), he stated, "Well, I am sure that my statements reflect two different answers," and yet, both statements were made under oath. This, of course, was lightly considered in the opinion of the Court of Appeals. "Inconsistencies in the government case does not require an inference that the government agents perjured themselves." Such statements certainly and definitely were without merit and the cases quoted in the opinion have no substance or thrust to defeat the facts and issues in

this matter of entrapment and the matter of inconsistent statements (Appendix "A", page A5).

The defendant in matters of entrapment has a burden of proceeding with evidence to show that he was in fact entrapped; but on the other hand, the government, when this matter of entrapment has been introduced, has a duty to prove beyond a reasonable doubt that there was no entrapment as a matter of law.

It was shown throughout the transcript that the government was travelling on very soft ground, was unable to carry its responsibility of proof beyond a reasonable doubt, that the government failed in its defense of entrapment; and so uncertain was the government in this area, that when the government in its presentation of the subject case made an effort to introduce evidence which was seized at the home of the defendant, to-wit. "Quinine" and the court denied upon objection of the defendant the introduction of said evidence and a discussion pertaining to this between the court and the government prosecutor (Tr. 107) reached a point where the prosecutor directed an inquiry to the court, to-wit: "How is the government to show pre-disposition?", and the court then said in response thereto, "wait until he raises the defense and then we will see" (Tr. 108). It is evident at this point in the proceedings and thereafter that the prosecutor himself did not feel a strong basis or any basis whatsoever that he would be able to respond and take up the defense of entrapment; and, again nowhere does it appear in the record that such defense was met and a pre-disposition by the defendant proved beyond a reasonable doubt.

It was therefore shown without a doubt that entrapment was a substantial defense and was proven by the

defendant as a matter of law; and, the government did not meet its burden of proving beyond a reasonable doubt that entrapment was not shown.

The government witnesses, the Drug Enforcement Agents, admitted they created and formulated the plans to contact the defendant. No pre-disposition was shown. Defendant had no prior criminal record of activity.

The instant case falls within the purview of *Hampton* v. *United States,* 96 S. Ct. 1646 (1976), for the defendant Spain had no prior criminal convictions or record; the government agents formulated and created the activity and supplied the controlled substances to defendant; and no predisposition to commit the crime was shown by the prosecutor.

The limitations of the due process clause of the Fifth Amendment, and of those portions of the Bill of Rights which it has been held to incorporate, came into play, for the government's activity in question in the instant case violated protected rights of the defendant Spain.

2. THE GOVERNMENT ABUSED THE RIGHTS AND PRIVILEGES OF THE DEFENDANT WHEN THE PROSECUTOR USED LANGUAGE IN HIS FINAL ARGUMENT THAT WAS SO BLATANTLY PREJUDICIAL AS TO DENY THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW.

The closing argument of the prosecutor was so blatantly and emotionally prejudicial that the jury in this instance could not be otherwise than swayed to the utmost degree by the context of the verbiage set forth in the said closing argument.

The government prosecutor propounded an improper, inflammatory and prejudicial closing argument, which was

of such a nature that it could not be cured by objections, rulings thereon, or by instructions of the district court to disregard them; but, having been made to the jury, said final argument necessarily caused the jurors to misunderstand the law applicable to the case, the defense of entrapment, and to feel prejudice and ill-will toward Hubert Spain, his witnesses and improperly reflected upon the integrity of the defendant and his attorney, as shown by the record and the verdict.

The opinion in the Court of Appeals is most susceptible of the inner feelings of the court, for while preparing the decision affirming the trial court, it set forth almost in detail the verbiage of the prosecutor where it said "in the case at bar the prosecutor repeatedly described the defense as "concocted, fabricated, contrived, tailored, perjured and a lie"; and, "The defendant was said to be trying to frame the government by bringing you this perjured testimony"; and "A defense witness was characterized as a liar, and said to have given "lie testimony"; and, "All this may have been literally true and yet it was not proper argument." The court went on to say "We do not say that the use of any of these expressions is improper in all circumstances, but their emotive and pejorative connotations tend to impair the calm and detached search for truth to which a criminal trial should aspire, and they should be avoided. We can add that their injudicious and excessive use is likely to be self-defeating, repelling jurors instead of convincing them."

The defense pointed out in its brief in great detail 19 absolute vilifications of the defendant and his counsel by the prosecutor in his final argument as set forth in the transcript extending from (Tr. 516) to (Tr. 554); and when read in its entirety, it indicates the detrimental

and descructive features of this most prejudicial final argument.

In the case of the *People of the State of Illinois* v. *Carl Weathers,* 62 Ill. 2d 114, the ranting of the prosecutor in his closing argument was severely condemned. The Supreme Court of Illinois stated the prosecutor's closing argument involving charges that the defendant and his attorneys had lied warranted reversal. The court said at page 119 "each of the five remarks was grossly improper, we condemn them. Mr. Corsentino far exceeded the boundaries of permissible commentary, he would be well advised to remember that every defendant regardless of the nature of the proof against him is entitled to a fair trial (citations). It is one thing for a prosecutor to get caught up in the heat of battle and make a mistake, but it is quite another to repeatedly transgress the bounds of decency and fair play. The law expects more and indeed demands more than one who is trained in law and who represents the people in a criminal prosecution." It will be noted that the court speaks here of only *five* remarks which they considered grossly improper as compared to the numerous and sundry remarks made by the prosecutor in the instant case.

As to the defendant's final argument, in view of the prosecutor's argument, defendant's counsel argument falls within the "invited response" doctrine. *United States* v. *Bastone,* 526 F.2d 971 (7th Cir. 1975).

The law as set forth in *People* v. *Weathers* is more than bolstered in the matter of *United States of America* v. *Jimmy E. Phillips* decided December 30, 1975, which was reported in the United States Court of Appeals for the Seventh Circuit under No. 75-1423, wherein the prosecutor said in his closing argument, "if you try to reason any

other way (that this case has not been proved beyond a reasonable doubt) it would seem to me the way you are going to have to find is that the Government somehow or another trumped-up a charge. In other words, you are going to have to find, I guess, that we really did not get this stuff from anybody, that they tried to make a case on these guys and just went there with this stuff and came back and said, well, we got it from these people. If you make that kind of finding on the basis of the evidence you have before you, I cannot help you because the effect of what you are saying is that . . . (the government agent) has violated the civil rights of these two people, in other words he has committed a crime and that. . . ."

In the instant case we have the same situation involving the defendant Spain, where the prosecutor in his closing argument said, "Now in order to find the defendant Spain not guilty in this case you have got to determine in your mind that five government agents walked in here collectively and individually decided that they were going to frame Hubert Spain. You have got to have in your mind that these agents forged their reports, they perjured themselves on the stand, that they got together on some day and decided we are going to get Defendant Spain. You have also got to conclude that they concocted up this defense on Defendant Spain. You have to conclude that what has been brought to you here is not an informant case as a case made by agents, you have got to conclude that over 37 years of total experience these agents is a mere frame. Now I ask you: these agents had no motive to lie, who has the motive to lie in this case, and who has lied in this case and who has come up with this concocted defense is the defendant Hubert Spain." The court in the *Weathers* case concluded that

statements like these of a prosecutor were highly prejudicial and erroneous and most probably that the defendant did not receive a fair trial to which he was entitled.

The case of Defendant Spain without a question falls within a purview of *People of the State of Illinois* v. *Carl Weathers,* and *United States of America* v. *Jimmy E. Phillips.*

The Court of Appeals condemned the impropriety of the prosecutor's final argument throughout its opinion. It stated "That the arguments attacking the credibility of opposing witnesses could have been made with more decorum by the prosecutor is an understatement. We shall have more to say about that later." (Appendix "A", page A7). Again, "we do not find plain error, neither do we condone the prosecutor's argument." (Appendix "A", page A7). And, "The prosecutor also told the jury several times that the defendant was attempting 'to sell you the Brooklyn Bridge.' It should be unnecessary for us to say that this hackneyed metaphor had no place in the courtroom." (Appendix "A", page A9).

When one adds all of the above remarks to the following remarks discussed in the opinion of the Court of Appeals, there is only one conclusion, *gross error* and a prejudicial final argument: "Defendant also complains of the following statement made by the prosecutor in responding during rebuttal to the defense's entrapment argument:

Agents of the federal government do not make those kind (sic) of cases unless, in fact, there is the evidence. Once the evidence is there, most certainly the case is made. *This was grossly improper.*"

It can be readily observed that the Court of Appeals strongly condemns the prosecutor's final argument, but

did nothing about such gross and improper argument; and, this is so even though it went on to state that "The records before us recently have too often disclosed prosecutorial arguments which, while not rising to the level of plain error, were nevertheless improper. If this continues, this court may find it necessary in appropriate cases to exercise its supervisory authority, even in the absence of plain error. In the future all federal prosecutors in this circuit will conform their arguments to the standards set by the Supreme Court in the *Berger* case."

If the instant case had no plain error and the final argument was so grossly improper, why wait, why give the government "one more bite of the apple" to the prejudice of this defendant. If the remarks of the prosecutor were so grossly improper, why not reverse now— why didn't the Court of Appeals exercise its supervisory authority and stop such arguments by the government now — why wait for another argument like this.

Such final argument violates due process of law. The way to ensure compliance with the standards set up by the Supreme Court in *United States* v. *Berger,* 73 F.2d 278 (2d Cir. 1934) was to do something *now* and not wait for the next case to come along.

If such final argument was grossly improper now — there should be no opportunity for the government to again make such a fatal and improper argument which prejudiced the defendant and denied him a fair trial and due process of law.

In *Glasser* v. *United States,* 315 U.S. 60, 67, the court discussed constitutional safeguards where the smallest error could have swung the balance between innocence and guilt and said:

"In all cases the constitutional safeguards are to be zealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swing the scales toward guilt."

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JOHN J. WALLACE
ELLIOTT KALCHEIM
79 West Monroe Street
Chicago, Illinois 60603
Attorneys for Petitioner

WALLACE, SHELTON, KLEINMAN & KALCHEIM
79 West Monroe Street
Chicago, Illinois 60603
782-9035
Of Counsel

APPENDIX "A"

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
JUNE 11, 1976

Before

Hon. PHILIP W. TONE, *Circuit Judge*
Hon. .....
Hon. .....

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 75-2127

v.

HUBERT SPAIN,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
(75 306 CR)

This matter comes before the court on the "MOTION FOR STAY OF MANDATE" filed herein on June 10, 1976 by counsel for the defendant-appellant. On consideration whereof, this Court being fully advised in the circumstances,

IT IS ORDERED that the aforesaid motion be, and the same is hereby, DENIED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 75-2127

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HUBERT SPAIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division—No. 75 CR 306
THOMAS R. MCMILLEN, *Judge.*

ARGUED APRIL 29, 1976 — DECIDED MAY 25, 1976

Before FAIRCHILD, *Chief Judge*, CUMMINGS and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* The defendant was convicted in a jury trial of distributing controlled substances in violation of 21 U.S.C. § 841(a) (1). On appeal, he argues that entrapment was established as a matter of law and that the prosecutor's closing argument was improper. We affirm.

The defense and prosecution offered sharply differing versions of the facts. We must assume for purposes of appeal that the jury accepted the government's version, which was as follows: (Drug Enforcement Administration agents learned that defendant, who operated a pharmacy

on Chicago's south side, had ordered large amounts of quinine, which is not a controlled substance but which is sometimes used to dilute heroin. DEA Agent Kenneth L. Rhodes called defendant by telephone and, without identifying himself, said he wanted to talk to defendant about "some Q," meaning quinine. Defendant told him to come to the pharmacy. Rhodes did so the next day and offered to trade quinine for "uppers . . . . That is some fat pills." Defendant said he could get as much didrex, a controlled substance, as Rhodes wanted. Defendant examined bottles of quinine Rhodes had brought with him and asked whether Rhodes had any sealed bottles. Rhodes replied that he did.

The next day Rhodes again called defendant and agreed on the specific terms of a barter of quinine for didrex tablets. That afternoon the transaction was consummated, future barters were discussed, and it was arranged that a messenger, who turned out to be Agent Kenneth Labik, would handle future transactions on behalf of Rhodes.

Subsequent transactions during the next month followed the same pattern, except that in some instances controlled substances other than didrex were received for the quinine. The last of these transactions was initiated by defendant, who telephoned Agent Labik and said he "had 500 tablets of didrex for sale for 50 ounces of quinine" and agreed to meet Labik in a parking lot to make the exchange. At that meeting defendant delivered the didrex to Labik and was immediately thereafter arrested. After being duly informed of his constitutional rights, defendant at first said he was using the quinine to prepare a hair product, but then admitted that he was selling it to narcotics dealers. There was no evidence of other prior criminal activity by defendant.

Defendant's version of the facts was markedly different from that of the agents. He testified that, in their first meeting, Rhodes identified himself and "said that he wantde to catch this white fellow and his frieds that are sell-

ing, pushing pills to the black kids in the community and he needed my cooperation." Defendant testified that he at first declined but after being threatened with harassment agreed to cooperate, following which Rhodes gave him pills with instructions to give them to the suspected pusher in return for quinine. Defendant's account of the conversation was corroborated by a witness who testified that he overheard it while repairing a stamp machine nearby.

Later, defendant testified, a stranger delivered to him at the pharmacy a package containing controlled substances which he later delivered to Labik in exchange for quinine. This was corroborated by a witness who testified that he was sitting in an automobile smoking a marijuana cigarette when three men approached him and told him they were police and would arrest him unless he delivered a package to the pharmacy of the defendant, whom he did not know, and that he then delivered the package.

Defendant's account of the arrest also differed sharply from the accounts of the agents. He testified that a dirty cigar picked up from the ground was shoved into his mouth by one of the agents, that the agents threatened to kill him, and that one held a gun to his head. He denied making any admission to the agents. These assertions were first made at the trial. No motion to suppress was ever made. The agents testified that they did not assault or threaten defendant.

There were other disputed issues of fact of less significance, such as whether quinine is difficult to obtain in large quantities and whether defendant had a legitimate use for quinine in conection with experiments he was conducting to develop a hair grooming product. The jury wsa justified in resolving these issues, like the other factual issues, against defendant.)

1.

We can quickly dispose of defendant's argument that the testimony of the agents was inherently incredible

because it was conflicting with respect to details of the arrest. Agent Weinstein testified that he and Labik "had guns" on defendant (who was armed) and that defendant admitted using the quinine to dilute heroin seconds after saying he was using it for a hair preparation. Labik testified that he "never placed a gun on" defendant and that defendant changed his story after 20 minutes of conversation. The jury could have found that these discrepancies, which concerned collateral matters, were the result of mistake. Inconsistencies in the government case do not require an inference that the government agents perjured themselves. *Chapman* v. *United States,* 408 F.2d 11, 12 (2d Cir. 1969). Even if the jury found that an agent had deliberately testified falsely on a collateral matter, it could still accept the substance of his testimony on the issues in the case. See *United States* v. *Proprano,* 418 F.2d 1069, 1074 (2d Cir. 1969), *cert. denied,* 397 U.S. 1021; *Wyatt* v. *United States,* 263 F.2d 304, 308 (5th Cir. 1959), *affirmed,* 362 U.S. 525 (1960).

2.

The defense of entrapment is available when a defendant who was induced to commit an offense by government agents had no predisposition to commit the offense. *United States* v. *Russell,* 411 U.S. 423, 433-436 (1973); *United States* v. *Perry,* 478 F.2d 1276, 1278 (7th Cir. 1973), *cert. denied,* 414 U.S. 1005. A corollary of this principle is the rule that "mere solicitation" by government agents "is not enough to show entrapment." *United States* v. *Perry, supra,* 478 F.2d at 1278; accord, *Kadis* v. *United States,* 373 F.2d 370, 374 (1st Cir. 1967); and see *Lewis* v. *United States,* 385 U.S. 206, 208 (1966).*

---

* It has been held that proof of solicitation imposes on the government the burden of proving propensity, *United States* v. *Jones,* 360 F.2d 92, 96 (2d Cir. 1966), *cert. denied,* 385 U.S. 1012; but see Hays, J., dissenting in *United States* v. *Riley,* 363 F.2d 955, 959-961 (2d Cir. 1966); but propensity can be shown by the defendant's ready response to the solicitation, *United States* v. *Viviano,*

Entrapment is established as a matter of law only when the absence of predisposition appears from uncontradicted evidence. In the case at bar the evidence bearing on the issue of predisposition was in conflict, and that issue was therefore properly submitted to the jury. The evidence from which the jury could properly have found predisposition included defendant's ready response to the solicitation, *United States* v. *Viviano,* 437 F.2d 295, 299 (2d Cir. 1971), his initiation of the final transaction, on which one of the counts of the indictment was based, and his admission that he was distributing quinine to narcotics dealers for use in diluting heroin. The defense of entrapment was properly submitted to the jury, and the jury was justified in rejecting the defense.

3.

We turn now to the issue of whether the prosecutor's closing argument, to which (with one irrelevant exception) no objection was made, was so prejudicial as to amount to plain error under Rule 52(b), Fed. R. Crim. P. Since irreconcilable conflicts in the evidence could not have been the result of honest mistake each counsel was of course entitled to argue that witnesses called by him had spoken the truth and those called by the other side had testified falsely. There was no other way to argue the case effectively. Urging the jury to believe the government witnesses' testimony did "not constitute a vouching for the credibility of the witnesses nor an indication of the prosecutor's personal belief or opinion as to guilt of the defendant." *United States* v. *Verse,* 490 F.2d 280, 282 (7th Cir. 1973), *cert. denied,* 416 U.S. 989 (1974).

---

* (Continued)

437 F.2d 295, 299 (2d Cir. 1971). It is unnecessary to decide whether to follow the Second Circuit's burden-of-proof rule, not only because no point concerning burden of proof is made in the case at bar, but because the trial judge instructed the jury, in substance, that the government was required to prove predisposition beyond a reasonable doubt.

That the arguments attacking the credibility of opposing witnesses could have been made with more decorum by the prosecutor is an understatement. We shall have more to say about that later. But counsel for the defendant, instead of objecting, chose to respond in kind. As he said in response to a prosecution objection during his argument, 'I didn't interfere with yours. Will you please let me speak because it is against you, counsel?" If counsel for defendant had objected when the first offensive statement was made by the prosecutor, the trial judge would presumably have corrected that error and prevented its recurrence not only during the argument of the prosecutor but, upon proper objection, during the argument for the defense as well. Instead of objecting, counsel for the defendant made an argument that was more offensive than the prosecutor's. The inference of tactical choice is unavoidable. We think that the defendant was not prejudiced by what occurred. The jurors must have understood that the version of one side or the other was false, and they were not likely to have been influenced in deciding which it was by the manner in which the assertions of falsehood were expressed in counsel's arguments.

Although we do not find plain error, neither do we condone the prosecutor's argument. By way of a background to what we have to say on this subject, it should be observed that judges have differed about the boundaries of legitimate prosecutorial oratory. Judge Learned Hand said over fifty years ago, "To shear him [the prosecutor] of all oratorical emphasis, while leaving wide latitude to the defense, is to load the scales of justice . . . ." *DiCarlo* v. *United States,* 6 F.2d 364, 368 (2d Cir. 1925). In *Berger* v. *United States,* 295 U.S. 78 (1935), the Supreme Court reversed the Second Circuit on the ground of prosecutorial misconduct, including a closing argument which Judge Hand had said "failed in moderation and good taste" but was not so gravely offensive as "to compromise its [the trial's] essential fairness." *United States* v. *Berger,* 73 F.2d 278, 279, 280 (2d Cir. 1934). While the Supreme Court described the closing argument as "containing improper insinuations and assertions calculated to mislead the jury," which included assertions as to the prosecutor's personal knowledge, the Court also criticized the argument as "undignified and intemperate." 295 U.S. at 85.

In another appeal decided shortly after the Supreme Court's decision in *Berger*, the Second Circuit, per L. Hand, J., noted that in view of that decision it "felt bound to look somewhat jealously for any abuse of his position by the prosecuting attorney," yet sustained a conviction despite an argument by the prosecutor that was "at times . . . certainly denunciatory." *United States* v. *Wexler*, 79 F.2d 526, 529, 530 (2d Cir. 1935), *cert. denied*, 297 U.S. 703. Judge Hand said:

> "It is impossible to expect that a criminal trial shall be conducted without some show of feeling; the stakes are high, and the participants are inevitably charged with emotion. Courts make no such demand; they recognize that a jury inevitably catches this mood and that the truth is not likely to emerge, if the prosecution is confined to such detached exposition as would be appropriate in a lecture, while the defense is allowed those appeals in misericordiam which long custom has come to sanction. The question is always as to the particular incident challenged, in the setting of the whole trial." 79 F.2d at 529-530.

The prosecutor's argument in *Wexler*, unlike that in *Berger*, did not contain improper insinuations or assertions. Because the argument was "supported by the evidence or by reasonable inferences from it," the court would not reverse merely because it contained "rhetoric [which] seems to us intemperate and feeble," but which "cannot be said to step beyond limits permissible to those who like it." *Id.* at 530.

Some years later Judge Evans of this court sustained the right of the prosecutor to "speak frankly, vigorously and effectively concerning the unfavorable facts, or to draw therefrom legitimate conclusions, unpleasant and embarrassing to the accused . . . ." He added,

> "The district attorney is quite free to comment legitimately and to speak fully although harshly upon the action and conduct of the accused, if the evidence supports his comments, as is the accused's counsel to comment upon the nature of the evidence and the character of the witnesses which the Government produces and which is favorable to him." *United States* v. *Freeman*, 167 F.2d 786, 791 (7th Cir. 1948), *cert. denied*, 335 U.S. 817.

In more recent times this court has held a prosecutor's reference to statements of a defendant as "lies" to be proper argument. *United States* v. *Isaacs*, 493 F.2d 1124, 1166 (1974), *cert. denied*, 417 U.S. 976. "Lies" was found permissible but "perjured" was said to be "rather ill-considered" in *United States* v. *Jansen*, 475 F.2d 312, 317 (7th Cir. 1973). A prosecutor's argument which, among 'a host of infirmities," included a characterization of the defense as one which the jury would "have to be born yesterday to believe" and as "riddled with lies," a "pack of lies," "an insult to your intelligence," and "concocted," was held by the Second Circuit to be sufficiently prejudicial, in combination with an incorrect instruction to the jury, to require a new trial in *United States* v. *Gonzales*, 488 F.2d 833, 836 (1973).

In the case at bar the prosecutor repeatedly described the defense as "concocted," "fabricated," "contrived," "tailored," "perjured," and "a lie." The defendant was said to be "trying to . . . frame" the government by "bringing you this perjured testimony." A defense witness was characterized as a "liar" and said to have given "lie testimony." All this may have been literally true, and yet it was not proper argument. We do not say that the use of any of these expressions is improper in all circumstances; but their emotive and pejorative connotations tend to impair the calm and detached search for truth to which a criminal trial should aspire, and they should ordinarily be avoided. We can add that their injudicious and excessive use is likely to be self-defeating, repelling jurors instead of convincing them.

The prosecutor also told the jury several times that the defendant was attempting "to sell you the Brooklyn Bridge." It should be unnecessary for us to say that this hackneyed metaphor had no place in the courtroom.

Nothing we have said is intended to discourage a prosecutor from vigorous argument or frank comment on the evidence or the character of a witness. The line between the "undignified and intemperate" (*Berger* v. *United States*, 295 U.S. at 85) and the "hard" (*id.* at 88) or

"harsh" (*United States* v. *Freeman*, 167 F.2d at 791) but fair, is not susceptible of ready definition. It can only be located through a sense of fitness and taste and an appreciation of the prosecutor's proper role (*Berger*, 295 U.S. at 88). Those who cannot discern that line with confidence had best stay a safe distance away from it.

Defendant also complains of the following statement made by the prosecutor in responding during rebuttal to the defense's entrapment argument:

> "Agents of the federal government do not make those kind [sic] of cases unless, in fact, there is the evidence. Once the evidence is there, most certainly the case is made."

This was grossly improper. There was, however, no objection. If there had been, the trial judge would presumably have suitably admonished the prosecutor for his misconduct and advised the jury that no such inference could be drawn. The trial judge later properly instructed the jury of the presumption of innocence and the limited function of an indictment, and admonished them that the indictment is not evidence of guilt and they must not be prejudiced against the defendant because an indictment was returned against him. After having carefully considered the prosecutor's statement in the context of the entire record, we are persuaded that it was not plain error.

The records before us recently have too often disclosed prosecutorial arguments which, while not rising to the level of plain error, were nevertheless improper. If this continues, this court may find it necessary in appropriate cases to exercise its supervisory authority, even in the absence of plain error. In the future all federal prosecutors in this circuit will conform their arguments to the standards set by the Supreme Court in the *Berger* case.

AFFIRMED.